Executing the Laws

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By DOUGLAS EDLIN

Lethal Force and Legal Process

According to Article II, Section 3 of the US Constitution, the President of the United States must "take care that the laws be faithfully executed." In a speech delivered earlier this month, Eric Holder, the Attorney General of the United States, offered a legal defense of actions taken by the United States government to kill American citizens living abroad who pose an imminent threat to US national security. In the speech, Attorney General Holder explained the Obama Administration's approach to the identification, detention, and prosecution of suspected terrorists. Holder also explained that, in certain circumstances, the United States must use lethal force rather than the legal process to combat the threat of terrorism. Here is a brief excerpt:

> *[J]ust as surely as we are a nation at war, we also are a nation of laws and values. Even when under attack, our actions must always be grounded on the bedrock of the Constitution – and must always be consistent with statutes, court precedent, the rule of law and our founding ideals . . . Some have argued that the President is required to get permission from a federal court before taking action against a United States citizen who is a senior operational leader of al Qaeda or associated forces. This is simply not accurate. "Due process" and "judicial process" are not one and the same, particularly when it comes to national security. The Constitution guarantees due process, not judicial process.*

After reading this, my immediate thought was: is that correct as a statement of US law? And a thought that occurred to me shortly thereafter (…) was: would this be an accurate statement of UK law?

What Process is Due?

The fundamental requirements of due process are adequate notice and a fair hearing. The US government may not deprive someone of his life, liberty, or property without first advising him of the claims against him and providing him an opportunity to defend against those claims before an impartial decision maker.

On this understanding of due process, a judicial hearing is not always required. In the US, as in the UK, administrative agencies and other non-judicial bodies often conduct hearings in which competing claims are resolved and rights are enforced. This satisfies due process in the absence of a judicial process.

But this does not really respond to Holder's argument. The question is whether the government can bypass a judicial process where an American citizen is suspected of "levying War" against the United States, or "in adhering to their [those of the United States] enemies, giving them Aid and Comfort." The problem for Holder is that Article III, Section 3 of the United States Constitution specifically anticipates the threat to national security posed by treason and explains how citizens suspected of treason must be treated by the government: "No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court."

The reference to “open court” in Article III, Section 3 seems to indicate that the process that is due to a citizen accused of treason is a judicial process. It is a hearing in court. The reference to a person being “convicted of treason” (and the placement of this language in Article III) establishes this as a power held solely by the judiciary. In fact, in *Marbury v. Madison*, Chief Justice John Marshall noted that this specific “language of the constitution is addressed especially to the courts.” The courts alone have the power to convict defendants of crimes, and treason is the only crime defined by the US Constitution.

This reading is consistent with the US Supreme Court’s decision in *Hamdi v. Rumsfeld,* 542 U.S. 507 (2004). In *Hamdi*, the US government claimed the authority to detain US citizens indefinitely without a hearing. Although the majority and dissenting justices disagreed about the specifics of the process, they agreed that, at a minimum, due process required the government to give Hamdi notice of its claims against him and an opportunity to contest these claims before “a neutral decisionmaker.” The majority believed that this neutral decision maker could be a military tribunal or a federal court. In dissent, Justice Scalia (possibly the most ideologically conservative member of the Court at this time) and Justice Stevens (perhaps the most liberal) concluded that only a federal court hearing would meet the requirements of the Constitution:

> *“Where the Government accuses a citizen of waging war against it, our constitutional tradition has been to prosecute him in federal court for treason or some other crime . . . The gist of the Due Process Clause, as understood at the founding and since, was to force the Government to follow those common-law procedures traditionally deemed necessary before depriving a person of life, liberty, or property.”*

Holder’s claim that the US government may kill a US citizen in the absence of any judicial process seems inconsistent with his reassurances that the United States government may act, even in the fighting of a war, only in a manner consistent with “the rule of law and our founding ideals.” In her opinion for the plurality in *Hamdi*, Justice O’Connor was careful to emphasize that “it is during our most challenging and uncertain moments that our Nation’s commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad.” Justices Scalia and Stevens expressed their understanding of the relationship between the rule of law and the founding ideals of the US in this way: “The very core of liberty secured by our Anglo-Saxon system of separated powers has been freedom from indefinite imprisonment at the will of the Executive.”

The *Hamdi* Court held that the US government cannot unilaterally and indefinitely detain a US citizen. Some judicial process is required to ensure that the requirements of due process are maintained when the US government deprives someone of his liberty. It would seem that the same process would be needed when the US government intends to deprive a US citizen of his life.

Traitors pose a unique threat, but not an unanticipated one. In their rejection of shared values and in their access to protected locations and information, their betrayal undermines the security of our lives and our beliefs. These threats were well known to the authors of the US Constitution. That is why the language of Article III, Section 3 exists.

A Shared Tradition

In adverting to “our constitutional tradition” in *Hamdi*, Justice Scalia was referring quite specifically to the Anglo-American constitutional tradition. The language of Article III, Section 3 itself is adapted from the Treason Act of 1351 (levying war, adhering to enemies, and giving them aid and comfort) and the Treason Act of 1695 (requiring a trial and the evidence of two witnesses to the same act). In his *Hamdi* opinion, Justice Scalia includes references to the Statute of Treasons, the Habeas Corpus Act of 1679, and several English cases from the seventeenth and

eighteenth centuries.

Is Justice Scalia's understanding of our constitutional tradition accurate? If Eric Holder were speaking about British policy, would due process require a judicial process in the UK? I think the answer is yes.

The argument has been made frequently since 11 September 2001, at least in the US, that evidence of potential terrorist threats may be extracted from detainees through torture (or "enhanced interrogation," or "degrading treatment," or whatever one may choose to call it). In the UK, the courts have refused to accept this argument. In *A v. Sec. of State for the Home Dept. (No. 2),* [2005] UKHL 71, the House of Lords reaffirmed the common law prohibition against the use in court of any evidence obtained by torture.

Even more recently, in *R (on the application of Mohamed) v. Sec. of State for Foreign and Commonwealth Affairs (No. 2)*, [2011] QB 218, the Court of Appeal was asked to consider the scope of the prohibition against torture in relation to the principle of "open justice." As Justice Scalia did in *Hamdi*, the Court of Appeal referred to "our shared traditions." In *Mohamed*, the Court was particularly concerned with a court's obligation to explain the reasons for its decision:

> *"The public must be able to enter any court to see that justice is being done in that court, by a tribunal conscientiously doing its best to do justice according to law . . . [T]he principle of open justice represents an element of democratic accountability, and the vigorous manifestation of the principle of freedom of expression. Ultimately it supports the rule of law itself. Where the court is satisfied that the executive has misconducted itself . . . all these strands, democratic accountability, freedom of expression, and the rule of law are closely engaged."*

If Holder were describing British policy, it seems almost inarguable that due process would require some judicial involvement. As with *Hamdi* and detention, if the rule of law and British constitutional principles prohibit the British government from torturing individuals suspected of terrorism (or using evidence obtained through torture against suspects), it is difficult to imagine that those same constitutional principles could permit the British government to kill individuals suspected of terrorism without any legal accountability in a judicial forum.

Where an individual claims that the government has violated his fundamental rights, due process requires a judicial process. The notion that the government may violate the law in the course of executing the law – whether that is in the detention of suspects, the use of torture to obtain evidence, or the summary execution of criminals – fundamentally contradicts the principle that the government is limited by the law. In our shared constitutional tradition, claims that the executive has violated the law are heard in court:

> *[T]he English conception of the rule of law requires the legality of virtually all governmental decisions affecting the individual to be subject to the scrutiny of the ordinary courts . . . The rule of law rightly requires that certain decisions, of which the paradigm examples are findings of breaches of the criminal law and adjudications as to private rights, should be entrusted to the judicial branch of government. This basic principle does not yield to utilitarian arguments that it would be cheaper or more efficient to have these matters decided by administrators. (Begum v. Tower Hamlets London Borough Council, [2003] UKHL 5, per Lord Hoffmann)*

The question remains whether and how the UK and US governments can protect their citizens by pursuing terrorist elements and threats in a manner that is consistent with our constitutional tradition. Maybe it is more difficult for constitutional democracies to fight terrorists. Maybe that is because what we are fighting for actually makes the fighting more difficult.

Traitors and Terrorists

Benedict Arnold received a trial. So did Guy Fawkes. So did John Walker Lindh.

According to Nils Melzer, *Targeting Killing in International Law*, Britain shifted its police policy after 11 September 2001 to a "shoot-to-kill" approach in certain instances of imminent threats of terrorist violence. Of course, this is quite different from drone attacks against citizens on foreign soil. The tragic shooting of Jean Charles de Menezes can be distinguished from the killing of Anwar al-Awlaki in many ways. One distinction is that al-Awlaki was a US citizen and de Menezes was not a British citizen. A second distinction is that de Menezes was killed on British soil and al-Awlaki was killed in Yemen. And another distinction is the activity each man was engaged in immediately prior to his death. The challenge is to decide which distinctions matter, and which do not, when considering how the UK and the US can combat terrorism without allowing the rule of law to become a casualty of that war.

It is easy for the government to say that it cannot wait when a terrorist is located. It must act before that individual escapes from view and has the opportunity to plan or carry out an attack against the UK or the US. It is easy for the government to say that it cannot conduct a trial of a citizen who has taken up arms against his nation. It has to fight the war first. But if the threat of terrorism means that the goal must be killing a citizen rather than trying him, even though trying him is what we have done in the past, the principles of law must still control the government. Not just the principles of the law of war, but the principles of the law of the constitution. There must be a process by which the rights of that person are considered along with his military value as a target.

This might not be as daunting as it seems. The judges of the US Foreign Intelligence Surveillance Court have for decades reviewed *ex parte* requests by the government for permission (or occasionally retroactive approval) to conduct covert surveillance operations in the US. Congress could create a separate court similar in composition and procedure to the FISC, or amend the Foreign Intelligence Surveillance Act to empower the FISC itself, to permit expedited review of government requests to engage in targeted killing. The court would be able to review the basis for the government's claims of imminent threat, the target's involvement, and satisfaction of the principles of necessity, distinction, proportionality, and humanity, which govern the use of force in war (and which Holder discussed in his speech). Although this would not provide the traditional judicial hearing envisioned by due process, it would provide judicial involvement in determining the legality of the government's actions as well as some independent consideration of the rights and interests of the individual involved.

In his speech, Holder claimed that the US will not target one of its citizens without first engaging in "a thorough and careful review." Holder also said that the President is not "required to get permission from a federal court before taking action." But when the action the President is contemplating is intended to take the life of an American citizen, the Constitution prohibits the government from taking that action without due process. And in the famous phrase of Justice Brandeis in *Crowell v. Benson,* 285 U.S. 22 (1932): "under certain circumstances, the constitutional requirement of due process is a requirement of judicial process." The government's first effort should always be to capture a citizen warring against his nation, and to try him in court, for treason or another crime. Where that truly is not an option, however, an alternative judicial process, such as the FISC, must be invoked to ensure that lethal force is never substituted for legal process by a government limited by law.

The United Kingdom and the United States must be able to defend themselves from the threats of terrorism, and from the threats of treason. However unprecedented the threats of terrorism may be, the threats of treason are not new. For hundreds of years, the UK and the US have used judicial processes to try those accused of betraying their nation. In a nation of laws and values, it seems impossible to reconcile indefinite detention and torture with due process. There may be a need for targeted killing. But a nation cannot defend its principles by violating them. The shared tradition of the UK and the US requires some judicial process by which the actions of the executive in conducting the war on terrorism may be evaluated according to the principles of Anglo-American constitutionalism.

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